JD–3–98
South Hadley, MA

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

HAAS ELECTRIC, INC.

and Case 1–CA–30745

IBEW LOCAL NO. 7, AFFILIATED WITH
INTERNATIONAL BROTHERHOOD OF
ELECTRICAL WORKERS, AFL-CIO

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DECISION

Statement of the Case

WALLACE H. NATIONS, Administrative Law Judge: On July 26, 1993, IBEW Local No. 7, Affiliated With International Brotherhood of Electrical Workers, AFL-CIO (hereinafter the Union) filed an unfair labor practice charge alleging that Haas Electric, Inc. (hereinafter Respondent or Haas) violated Sections 8(a)(1) and 8(a)(5) of the Act by refusing to abide by a collective bargaining agreement and by unilaterally changing terms and conditions of employment. On September 23, 1993, the Union amended its charge, alleging that the Respondent violated Sections 8(a)(1) and 8(a)(5) of the Act by refusing to abide by a collective bargaining agreement, unilaterally changing terms and conditions of employment and withdrawing recognition from IBEW Local No. 7.

On September 30, 1993, the Regional Director issued a Complaint and Notice of Hearing. On October 14, 1993, the Respondent filed a timely answer contesting the allegations contained in the complaint.

On December 1, 1993, the Region rescheduled the hearing from December 16, 1993 to February 28, 1994. On February 25, 1994, the Region postponed the hearing indefinitely. Nearly three years later, on January 2, 1997, the Region determined that the Respondent properly withdrew from the Union and issued an order partially withdrawing the Complaint and partially dismissing the charge. Almost seven (7) months later, on August 1, 1997, the Region issued an order rescinding its January 2, 1997 decision to partially withdraw the complaint and partially dismiss the charge. The Region also issued an Amended Complaint and Notice of

Hearing.

The Respondent filed a timely answer to the amended complaint on August 18, 1997. A corrected copy of the answer was filed on August 19, 1997.[1]

On August 26, 1997, the Region issued an order scheduling the hearing for October 14, 1997. The hearing was held in Springfield, Massachusetts on October 14 and 15, 1997. Briefs were filed by the parties on or about December 5, 1997. On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the parties, I make the following

Findings of Fact

I. Jurisdiction

The Respondent, a corporation, engages in the construction industry as an electrical contractor. It maintains a facility in South Hadley, Massachusetts. The Respondent admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. Alleged Unfair Labor Practices

A. Background and Issues for Determination

Respondent has been an electrical contractor in Western Massachusetts since 1955. It operated as a union contractor pursuant to agreements between the Union and the National Electrical Contractors' Association (NECA). Respondent never had a collective bargaining relationship with the Union independent of the NECA agreements with the Union. On July 1, 1993, Respondent withdrew recognition from the Union and has since operated as a non-union contractor, making unilateral changes in the terms and conditions of employment. The Amended Complaint raises these issues for determination:

1. Did Respondent unlawfully withdraw from multiemployer bargaining?

2. If not, was Respondent nevertheless required to recognize the Union on a single employer basis because it had perfected its right to Section 9(a) representative status pursuant to the voluntary recognition clause of the letter of assent?

3. Did Respondent make unlawful unilateral changes in the terms and conditions of employment of its electricians? [2]

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[1] The corrected answer to the amended Complaint changed the date in the sixth affirmative defense to properly reflect the date of June 30, 1993 rather than June 30, 1997.

[2] That Respondent made unilateral changes in the terms and conditions of employment after it withdrew recognition from the Union on July 1, 1993 was admitted in Respondent's answer to paragraph 11(b) of the Amended Complaint. See also the stipulation of the parties that: "From and after July 1, 1993, Haas withdrew recognition from the Union, and ceased paying and honoring the contract and went non-union.

B. Facts Relevant to the Multiemployer Bargaining Issue and Conclusions of Law

1. The Letters of Assent and Contract Status Prior to Respondent's Withdrawal of Recognition

On May 31, 1988, Respondent and IBEW Local 36 (the Northampton, Massachusetts Local) signed a "Letter of Assent", which provided in pertinent part, that:

"In signing this letter of assent, the undersigned firm does hereby authorize Western Ma. Chapter N.E.C.A., Northhampton Division as its collective bargaining representative for all matters contained in or pertaining to the current and any subsequent approved Inside labor agreement between the Western Ma. Chapter N.E.C.A., Northampton Division and Local Union 36, IBEW. The Employer agrees that if a majority of its employees authorizes the Local Union to represent them in collective bargaining, the Employer will recognize the Local Union as the exclusive collective bargaining agent for all employees performing electrical construction work within the jurisdiction of the Local Union on all present and future jobsites. This authorization, in compliance with the current approved labor agreement, shall become effective on the 1 day of June, 88. It shall remain in effect until terminated by the undersigned employer giving written notice to the Western Ma. Chapter N.E.C.A., Northampton Division and to the Local Union at least one hundred fifty (150) days prior to the then current anniversary date of he applicable labor agreement.

SUBJECT TO THE APPROVAL OF THE INTERNATIONAL PRESIDENT, IBEW"

The International of the IBEW stamped its approval on this letter of assent on August 16, 1988.

On August 1, 1988, Local 36 and Local 284, the Pittsfield, Massachusetts local merged into Local 7. Prior to the merger, Local 7 had been the local for Hampton County (the Springfield, Massachusetts area).

On February 21, 1991, Respondent and the Union entered into a new letter of assent, which was identical to the quoted portion of the 1988 letter of assent, except that "Western Mass Chapter of N.E.C.A." and "Local Union No. 7, IBEW" appeared in place of "Western Ma. Chapter N.E.C.A., Northampton Division," and "Local Union 36, IBEW," respectively, and the effective date was now "1st day of July, [19]90."[3]

Since the merger of the three locals and continuing until Respondent's withdrawal of recognition from the Union on July 1, 1993, Respondent worked in the pre-merger jurisdiction of both Local 36 and Local 7 and always fully complied with the terms of the multiemployer contract then in force.

By the fall of 1991 the NECA contractors were claiming that economic conditions in the area were such that they could no longer compete with the non-union contractors. The contractors demanded that the 1990-93 contract be reopened and economic concessions be

[3] The NECA multiemployer contract in force as of February 1, 1991, had a term which ran from July 1, 1990 through June 30, 1993. As of July 1, 1990, there were about twelve contractors in the multiemployer bargaining unit and in addition, there were about twenty "me-too" signatories.

granted by the Union. Union Business Manager Douglas Bodman recalled that by around the first of the year, the parties had agreed to reopen the contract and that bargaining sessions for this purpose occurred approximately monthly from March or April 1992 through June 1992. In June 1992, agreement was reached to replace the 1990-91 contract with the so-called July 1,1992 through June 30, 1994 contract. The 1992-1994 contract made substantial concessions, including: 1) the one year deferral of two upcoming wage increases called for in the 1990-93 contract; 2) a lower wage rate (the "B-rate") for projects less than $150,000 in size, which had previously only been available for Northampton projects, was extended throughout the Union's jurisdiction; 3) the annuity contributions were reduced; and 4) restrictions on the "portability" of electricians, which reflected the "turf" jealousies of the pre-merger locals, were eased. In return for these concessions, the only concessions which the Union received was an extension in the expiration date of the contract from June 30, 1993 to June 30, 1994.

2. Respondent's Reasons for Withdrawing Recognition

Just prior to 1989, Respondent bid on, and was awarded, a job on the Phoenix Mutual Life Insurance Building in Enfield, Connecticut. After the job commenced, the International Union re-drew the jurisdictional lines so that the Enfield job site switched from the jurisdiction of Local 7 to the Hartford, Connecticut Local. This resulted in a great deal of confusion and in-fighting between the Union Locals resulting in cost overruns and problems with completing the work in a proper and timely fashion. Due in large part to these problems with the Union, Respondent lost $400,000 on that job and exhausted its line of credit with its bank.

Because of its dire financial straits resulting from the losses on the Enfield job, combined with the recession which hit the construction industry in the involved region, Respondent went repeatedly to the Union and sought some relief from the wage rates contained in the contract in effect. The Local refused to do anything to change the rates or otherwise offer Respondent relief. Respondent's bank was also unwilling to offer further help. Thus, to save the business, its founder, owner and President, Frederick Haas used all of his personal resources to keep the business running. He also sent a letter to then Union Business Manager John Collins on January 2, 1992, notifying the Union that Respondent was terminating the agreement and getting out of the Union after 150 days. This letter reads:

"Please be notified that as of the date posted on this letter, Haas Electric Inc., 82 Main Street, South Hadley, Mass., is terminating the Labor Agreement between Haas Electric Inc., and Local #7 I.B.E.W. Haas Electric Inc., also acknowledges that this intent becomes final 150 days from date of notification, according to mutual agreement. It is with deep regret that Haas Electric Inc., must make this decision after 36 years of membership as an organized labor contractor.

In the last five months this contractor through its NECA affiliation and with direct contact with Local # 7 has pleaded its case that the economy that we work in, cannot support the labor cost, and Haas Electric Inc., has pointed out several ways that would help to keep its operation going, if some terms of easement of annuity, and by using a labor rate that is in effect in the Hamden district could be utilized. Changes that would only be for a short period of time to ease the crises. Labor Union #7 has not tackled this problem in a reasonable way, and obviously does not accept the hard fact that Western Mass., has lost 15,400 jobs in the past two years and the situation shows no sign of improving in the very near future.

No one likes giving up any advantage one has, whether it is union wages and benefits, or a contractor's special customer, but everyone should realize that concessions must be made that will truly effect the problems of today, and put many of the concessions granted during

normal bargaining sessions on hold during this crises. The Local Union must recognize that all contractors that sign the agreements must be given a fair chance to show a profit and pay their bills while they struggle to beat the competition and face the tough market place.

Please respond to this communication and forward your expectations of this contractor and put a final legal date of termination in your reply."

The letter was sent by certified mail. Respondent also sent copies of the letter to the NECA Chapter Manager David Keaney, and the Union's International Representative. Douglas Bodman, then the Business Representative for the Union, signed for and received the letter and delivered it to Collins. Neither the Local Union, the International Union nor NECA responded to Respondent's letter. Just before preparing the January 2, 1992 letter, Haas resigned from his long term Union membership.

On June 11, 1992, the Union sent Respondent a letter of Assent to sign indicating that Respondent would not get the market recovery money it had coming to it from the Union unless Respondent signed and returned the letter of assent.[4] Even though Respondent was owed market recovery money by the Union and was in desperate need of capital, Respondent refused to sign the letter of assent because it was withdrawing from the Union.

On June 29, 1992, Respondent wrote to David Keaney, referring to the January 2, 1992 withdrawal letter, reiterating that Respondent had withdrawn authorization for NECA to bargain on its behalf and stating that Respondent would not be bound by any revisions negotiated between the Union and NECA. Respondent also sent a copy of this letter to Union Business Manager John Collins. This letter reads as follows:

"It has come to my attention that NECA is seriously considering renegotiating the existing contract with Local 7, I.B.E.W. It is the position of Haas Electric, Inc. that NECA has already been notified that Haas Electric, Inc., has withdrawn its authorization to have NECA act as its bargaining agent with the Local. Haas Electric hereby reaffirms its letter of January 2, 1992, notifying yourself and Local 7 of its intentions. Therefore, Haas Electric does not agree to be bound by any revisions to the existing agreement dated July 1, 1990, between Western Massachusetts Chapter, NECA and Local 7, I.B.E.W."

On November 4, 1992, Respondent again wrote to NECA indicating that it had resigned from NECA and requesting to be informed of any commitment which might be in force after Respondent's departure from NECA. On December 21, Respondent once again wrote to NECA requesting written confirmation that NECA had received Respondent's letters indicating its withdrawal from the Union.

3. The Concession Negotiations During the Term of the 1990-1993 Contract and Respondent's Role in Those Negotiations

As noted above, in the first half of 1992, negotiations were held between NECA and the Union to discuss interim concessions to the 1990-1993 contract. Haas' Vice President Ralph Whitelock attended a number of those meetings on behalf of Respondent. Whitelock was

[4] The market recovery program (also known as the target money program) was a program designed to assist union contractors in competing against non-union contractors on certain targeted jobs selected by the Union. Upon completion of a targeted job, the Union would pay the Union contractor a certain sum of money.

aware, prior to attending negotiations, that Respondent had given notice of its intent to withdraw from the Union. Whitelock testified that he made no proposals during the negotiations and did not vote on any contract change to take effect after June 30, 1993. Bodman agreed that Whitelock made no proposals in the open negotiations, but noted that NECA proposals were formulated and votes were taken in private caucuses. Specifically, Whitelock testified that he did not vote on the contract extension.

As noted previously, the contract was extended one year and concessions were made. After the contract was so modified, Respondent abided by the modified terms, taking advantage of the concessions.

By the end of 1992, the NECA contractors informed the Union that the earlier concessions were not sufficient to restore competitiveness with the non-union contractors. In response, the Union agreed to bargain over the possibility of granting further concessions. At the hearing, the parties stipulated that: 1) meetings for this purpose took place on December 17, 1992, February 22, 1993, March 14, 1993, April 30, 1993, May 19, 1993, and June 3, 1993; 2) the last meeting attended by Respondent was the one on May 19, 1993; and 3) agreement was reached only at the June 3, 1993 meeting, subject to ratification.

The agreement reached on June 3, 1993 was reduced to writing on that occasion. In fact, however, this agreement was not ratified because the membership of the Union objected to one of its terms, *viz*., that on five occasions per year a contractor could by-pass the hiring hall and recall a laid-off electrician within 90 days of his layoff. NECA responded by withdrawing this proposal and actual agreement was reached around the end of June, 1993.[5] Under this agreement, the raises scheduled for January 1, 1994 were eliminated, all restrictions on "portability" were remove, the first 25 electricians on the referral list were allowed to solicit work directly from the contractors and the contract was extended through June 30, 1996.

It is clear from the testimony of both Bodman and Whitelock, that through May 19, 1993, Whitelock attended almost all of the bargaining sessions which led to the 1993 concessions. Whitelock made no announcement that he was there for the limited purpose of protecting Respondent's interests only up until the time of its exiting the multiemployer unit. On the other hand, it is certainly a logical contention that Respondent's notice of intent to withdraw dated January 2, 1992 and its letter of June 29, 1992 reiterating that point, served to give notice of its limited interest in the negotiations.

The 1992-94 contract, at Sec. 3.05, provided for various wage increases ranging from $.40 to $.50 per hour to take effect on June 1, 1993. GC Ex. 11 consists of letters from 7 NECA contractors, including Respondent, to NECA President and fellow contractor Thomas A. Schmitt, dated between April 28 and 30, 1993, and a letter dated April 29, 1993 from Schmitt to the Union. The letters to Schmitt all argue for the cancellation of the June 1, 1993 raises. Schmitt's letter does the same and encloses the other 7 letters. Bodman testified that these 8 letters were also received by the Union in ordinary course after the date of Schmitt's letter. General Counsel and the Union contend that based on the timing of the letters and their similar messages that their writers knew that they were intended for submission to the Union. I do not make that inference and credit Frederick Haas' testimony that he was unaware that his letter would be put to such a purpose. Haas did, however, candidly admit that when, in his letter to Schmitt, he referred to the June 1, 1993 raise as one "scheduled for July 1, 1993," it was because at the time he wrote the letter his understanding was the erroneous one that the

[5] The contract was signed in late July, 1993.

increase was in fact scheduled for July 1, 1993.

Upon the expiration of the contract on June 30, 1993, Respondent withdrew from the Union. Thereafter, in December 1993 or early January, 1994, the Union pulled its members out of Respondent. At that time, four of the ten Union members working for Respondent went back to the Union. The remaining six stayed with Respondent.

4. Conclusions with Respect to the Lawfulness of Respondent's Withdrawal of Recognition from the Union and from the Multiemployer Bargaining Relationship.

In *Deklewa and Sons,* 282 NLRB 1375 (1987), the Board held that construction industry employers and unions may not unilaterally abrogate a Section 8(f) pre-hire contract during the term of the agreement, but that either party is free to repudiate the 8(f) relationship upon expiration of the contract and all collective bargaining obligations would cease. *Deklawa* dealt with a statutory issue of what the law would require of a Section 8(f) employer in the absence of any agreement to the contrary by the parties (i.e., by means of a letter of assent). The Board in *Deklawa* was not faced with the issue of whether the parties could contract through a letter of assent to allow the employer to exit the Section 8(f) relationship prior to the contract's expiration date. Nothing in *Deklawa* precludes the parties right to freely contract and agree to allow the employer to announce its intention to withdraw prior to the expiration of the contract. However, in *Deklawa,* the Board held, *inter alia,* that a Section 8(f) employer was bound by the terms of the relevant collective bargaining agreement until its expiration and then the employer was free to dissolve its relationship with the union.

The general rule for withdrawal from multiemployer bargaining was set forth in *Retail Associates, Inc.,* 120 NLRB 388, 395 (1958), where the Board held that such withdrawal required "adequate written notice given prior to the date set by the contract for modification, or to the agreed-upon date to begin the multiemployer negotiations." The Board continued, "Where actual bargaining negotiations based on the existing multiemployer unit have begun, we would not permit, except on mutual consent, an abandonment of the unit upon which each side has committed itself to the other, absent unusual circumstances." Further, even assuming that timely notice of intent to withdraw has been given under *Retail Associates,* supra, if the employer subsequently acts inconsistently with its announced intention, the Board will not consider the withdrawal to be effective. See *Dependable Tile Co.,* 268 NLRB 1147 (1984), wherein the Board concluded that active participation "in group negotiations for a *new* multiemployer agreement is clearly inconsistent with a stated intent to abandon group bargaining and negotiate separately." The Board also stated, however, if the employer "had merely participated in the sessions in order to administer the expiring contract," it would consider this action consistent with the stated intention to abandon group bargaining. As the Administrative Law Judge explained in *Associated Shower Door Co.,* 205 NLRB 677, 682 (1973), an employer attempting to be a party to group negotiations while reserving the right to reject the outcome of such negotiations is unfairly seeking "the best of two worlds." Active participation in negotiations for a new contract remains a recommitment by an employer to multiemployer bargaining and appears to negate any attempt at withdrawal absent clear indication by the withdrawing party to the contrary. See *James Luterbach Construction Co.,* 315 NLRB 976 (1994).

General Counsel and the Union assert that, *inter alia*, Respondent's letter of withdrawal was not sufficient to effect Respondent's withdrawal from the mutliemployer bargaining as it only states that Respondent was terminating his agreement with the Local. I disagree. The letter, set forth on pages 4 and 5 above, does give notice that Respondent intends to terminate its relationship with the Union after 36 years, giving a clear inference of finality to the

relationship. It references the 150 day notification period noted in the Letter of Assent, which is the amount of notification which must be given to effectively withdraw the authorization for NECA to bargain on its behalf. Moreover, no one from the Union or NECA questioned the meaning of the letter, which clearly indicates to me that they knew what Haas intended. I do not accept the Union's and General Counsel's contentions in this regard and find that the letter was clear, unequivocal and effective notice of Respondent's intent to withdraw from the multiemployer bargaining group and terminate its ties with the Union.

Even if the letter were not sufficient notice, Haas' subsequent letters made it clear that withdrawal was its intent. On June 11, 1992, Local 7 sent Haas a letter indicating that he had to execute an enclosed letter of assent in order to obtain the market recovery money it had coming to it. Haas refused to sign the letter of assent because it was withdrawing from the Union.

On June 29, 1992, Haas wrote to NECA, referencing the January 1992 letter, reiterating that Respondent had withdrawn authorization for NECA to bargain on its behalf and stating that Haas would not be bound by any subsequent agreements negotiated between Local 7 and NECA. Haas sent a copy of that letter to John Collins, Local 7's Business Manager. Again, neither NECA nor Local 7 responded.

` On November 4, 1992, Haas again wrote to NECA indicating that it had resigned from NECA and requesting to be informed of any commitment which might be in force after Haas' departure from NECA.

On December 21, 1992, Haas once again wrote to NECA requesting written confirmation that NECA had received Haas' letters indicating its withdrawal from the Union.

The Union and General Counsel next contend that by Whitelock's attendance at the negotiation sessions for interim concessions, and by Frederick Haas' April 1993 letter to NECA, Respondent has engaged in conduct inconsistent with its stated intention to withdraw from multiemployer bargaining and therefore nullifies the purported withdrawal. The evidence shows that in 1992 and in 1993, NECA and Local 7 were engaged in negotiations over mid-term concessions demanded by the contractors because of the downturn in the construction industry. They needed immediate relief from the terms and conditions of the existing contract. Respondent was not withdrawing from the Union until June 30, 1993.[6] Respondent was bound by the contract until that date and had every right to attend and take part in negotiations over interim changes that would apply to it before the withdrawal was effective.

These interim negotiations were very informal. There was no formal agenda of what was to be discussed during negotiations, no meeting minutes were distributed to contractors and there was no feedback from the Union or from NECA for contractors who did not attend the negotiations. Contractors such as Haas had no way of knowing what interim changes were being discussed and how they would affect them unless they attended the negotiations. The undisputed evidence shows that as soon as Whitelock learned that the negotiations would begin including a proposal for a contract extension, he ceased attending negotiations. The April 1993 meeting which Whitelock attended was specifically called to discuss the raise due to take

[6] The parties generally agree that the "anniversary date" refered to in the letter of assent would be the date of the expiration of the existing contract. Respondent asserts and I agree that this date was June 30, 1993, the expiration date of the existing contract at the time Respondent gave notice of its intention to withdraw.

effect on June 1, 1993, prior to Respondents planned withdrawal date.

Though Whitelock did not preface his participation in the interim negotiations with a stated disclaimer that Respondent was withdrawing on June 30, 1993, I do not believe such was necessary. The January 2 and June 29, 1992 letters made that clear. At the negotiations, Whitelock did not propose nor did he vote on changes which would take effect after June 30, 1993. I find that Respondent's participation in *interim* negotiations, limited to participation over changes to the *existing* contract, does not constitute an attempt to seek "the best of two worlds" in a successor agreement. Rather, it constitutes a rational attempt to control what responsibilities Respondent had under the contract to which it was a party and is not at all inconsistent with its notice of intent to withdraw.

Turning next to Haas' April 28, 1993 letter, it is addressed to NECA and complains of a wage increase it mistakenly states is to take place on July 1, 1993. The increase was actually to take place on June 1, 1993 and would have affected Haas for a month. Haas testified that the letter was not intended for the Union and I credit this testimony. I do not find that the letter is sufficiently inconsistent with Haas' earlier repeated statements of intention to withdraw to legally affect the withdrawal. Certainly it did not raise enough interest to even draw a question from either the Union or NECA.

I therefore find that Respondent gave clear and unequivocal notice of its intention to withdraw from multiemployer bargaining and sever its Section 8(f) relationship from the Union effective at the end of June 30, 1993 and that such withdrawal was lawful. That this date was extended does not in my opinion change the effective date of withdrawal, absent Respondent's consent. The interests of small contractors like Haas is not always consistent with NECA's interests and objectives. For example, in this case, Haas's withdrawal was based on Respondent's need to survive as a going business. On the other hand, NECA desired to maximize its membership so as to ensure its strength. NECA went so far as to promise the Union in writing to try to keep contractors from withdrawing. Thus NECA openly admitted its intent to pressure contractors to stay members even though Haas had a contractual right to withdraw. If Unions and multiemployer associations were allowed to renew and extend an existing agreement so as to deny employers the ability to properly withdraw in a timely fashion, *Deklawa's* promise that Section 8(f) employers are free to withdraw recognition after the contract's expiration would be rendered hollow and illusory.

The claim that Haas should not been able to take advantage of the concessions granted as part of the 1992-1994 contract unless it agreed to an extension of the contract is not compelling. This claim was not presented to Haas when it accepted the interim concessions. Haas, correctly in my opinion, was bound to follow the terms of the contract until June 30 1993. If the Union seriously considered Haas to be in violation of the agreement or an understanding with respect to the agreement, it was obligated to raise the point with Haas. As noted, Haas could not avoid the interim negotiations as it was not able to withdraw earlier than at the end of June 30, 1993.

C. Facts Relevant to the Issue of Whether the Union Achieved Section 9(a) Representative Status and Conclusions with Respect to this Issue.

On or about January 21, 1991, the Union's Business Manager sent Respondent a letter along with a letter of assent and authorization cards signed by ten of Respondent's employees. This letter reads:

"Enclosed please find copies of representation cards received from electrical workers

currently employed by you.

These cards represent a majority of employees desiring representation in matters of collective bargaining by IBEW Local Union 7.

Please be aware that we do in fact represent a majority of electrical workers employed by you."

The parties stipulated that one of these cards, that of Respondent's Vice President Ralph Whitelock, is irrelevant to the issue of whether the Union ever demonstrated majority support among Respondent's electricians. Another of these cards, signed by Ralph Whitelock's son, is also irrelevant to this issue because it is undated and hence Respondent lacked notice of when it was signed or, consequently, whether this person was in its employ at the time of signing. The parties further stipulated with respect to the remaining 8 cards that they were signed by the following persons on the following dates:

Donald Cloutier	11/4/87
Mark Lenelin	5/5/89
Denis Gareau	6/5/89
Daniel Morin	6/5/89
Jon Montemagni	8/11/89
Arthur Peters	sometime in 1990[7]
Laurence Charette	4/30/90
Jemmie Plasse	4/30/90

It was further stipulated that these 8 persons were bargaining unit electricians of Respondent on the dates they signed their authorization cards and when Respondent received the cards. Bodman testified that Union records established that these persons were members of the Union in good standing at the times they signed their cards and remained so at least throughout 1991. The parties also stipulated that at the time Respondent received these authorization cards, it employed 12 bargaining unit employees.

Respondent never replied to or challenged in any way the Union's January 25, 1991 letter prior to the institution of this proceeding. The Union never followed up on this letter and demanded recognition under Section 9(a) until the institution of this proceeding.

At all relevant times, Respondent has been an electrical contractor with the building and construction industry within the meaning of Section 8(f) of the Act. From its inception, Haas drew its labor pool from the Union hiring hall without any showing of majority support. There is a strong presumption in the construction industry setting, that the relationship between an employer and a union is a Section 8(f) relationship. *Deklawa and Sons,* supra, at 1387 n. 41. The party who is trying to establish a Section 9(a) relationship must carry its burden and rebut that presumption. *Id. "*Under *Deklawa,* the Board presumes that parties in the construction industry intend their relationship to be an 8(f) relationship. Thus the burden is on the party who seeks to show the contrary, i.e., that the parties intend a 9(a) relationship." *Casale Industries,* 311 NLRB 951, 952 (1993); *J & R Tile, Inc.,* 291 NLRB 1034 (1988).

The essential elements for transforming an 8(f) relationship into a 9(a) one are: 1) an unequivocal demand for recognition by the union; 2) coupled with a contemporaneous showing of majority support; and 3) the unequivocal granting of recognition by the employer. The Union

[7] Because the General Counsel had the burden of proof, Peter's card must be deemd to have been signed as early as possible in 1990, i.e., on January 1, 1990.

and General Counsel contend that the 1988 and 1991 letters of assent constitute agreement by Haas to recognize the Union by some method of majority showing other than a Board supervised election. They further contend that the January 25, 1991 letter from Local 7 to Haas containing ten signed authorization cards was sufficient to establish majority support for the Union under Section 9(a) of the Act. I believe they are incorrect on both counts.

Both the 1988 and 1991 letters of assent provide in relevant part as follows:

"The employer agrees that if a majority of its employees authorizes the Local Union to represent them in collective bargaining, the Employer will recognize the Local Union as the exclusive collective bargaining agent for all employees performing electrical construction work within the jurisdiction of the Local Union on all present and future job sites."

Neither letter of assent indicates that an employer, who signs the document, agrees to voluntarily grant recognition under Section 9(a). Indeed, the Union must have recognized this fact as it changed the language in the 1992 letters of assent to expressly reference Section 9(a). Haas refused to sign the 1992 letter of assent. Neither the 1988 or 1991 letters of assent indicates that a signatory employer agrees that majority status can be established upon a showing of authorization cards signed by a majority of its employees as opposed to a Board-supervised election or some other means of voluntary recognition. The law requires positive evidence that the union unequivocally demanded recognition as the employees' Section 9(a) representative and the employer unequivocally accepted it as such.

In *Goodless Electric Co., Inc.,* 321 NLRB 64 (1996), the Board held that the 1992 letter of assent, identical to the one which Haas refused to sign, without more, constituted a continuing unequivocal demand for voluntary recognition and a continuing unequivocal promise by the employer to grant voluntary recognition if the Union demonstrated majority support.[8]

Unlike the letter of assent in *Goodless,* and unlike the 1992 letter of assent which Haas refused to sign, the letters of assent involved in this case make no reference whatsoever to Section 9(a) of the Act. Similarly, Collins letter to Haas on January 25, 1991 makes no reference to Section 9(a). Haas had no reason to believe that the letter was anything but a formality for the Union's records so that it could pay market recovery funds to contractors who employed Local 7 members. Indeed, the Union indicated that the letter was sent out to all contractors at the time. Haas filed the letter and never responded to it because it had no significance to him. The Union never called or wrote to Haas to tell him that it considered their relationship to be converted from a Section 8(f) one to one under Section 9(a). The Union continued to attempt to have Haas sign a letter of assent as it if had a Section 8(f) relationship with Haas. I believe that the Union's unsuccessful attempt to induce Haas to sign the 1992 letter of assent demonstrates that the Union knew the earlier letters of assent did not constitute a valid continuing demand and grant of recognition under Section 9(a). In this regard, neither the Union nor General Counsel called as a witness the author of the January 1991 letter, John Collins. This is true though he is still a Union member, a friend of the current business manager, and a resident of the city in which this hearing was held. Respondent requests and I make two adverse inferences with respect to this failure under the missing witness doctrine.

[8] In *NLRB v. Goodless Electric Co., Inc.*, 156 LRRM 2244 (1st Cir. 1997),at 2250-51, the Court rejected, as contrary to Board precedent, that the 1992 letter of assent signed by Local 7 and another contractor constitued for the remainder of its term, both a continuing request by the Union for 9(a) recognition and a continuing promise by the employer to grant voluntary recognition if the Union demonstrated majority support.

"The familiar rule, accepted by the Board, [is] that when a party fails to call a witness who may reasonably be assumed to be favorably disposed to the party, an adverse inference may be drawn regarding any factual question on which the witness is likely to have knowledge." *International Automated Machines,* 285 NLRB 1122, 1123 (1987). The first such inference is that Collins would have admitted that he understood Haas' letters of January 2 and June 29, 1992 as clear and unequivocal notices of withdrawal. The second is that Collins could not testify that he intended the January 25, 1991 letter to be a demand for recognition under Section 9(a).

Haas never expressly and unequivocally granted voluntary recognition under Section 9(a). Indeed, everything Haas sent to the Union subsequent to the January 1991 letter on the subject, expressly states Haas' intention to terminate its relationship with the Union. As noted above, the Union never responded to any of these notices, and specifically never raised the assertion that the Union enjoyed a Section 9(a) relationship with Haas.

Furthermore, if *NLRB v. Goodless,* is the law in this Circuit, then there is a serious problem with the requisite showing of a contemporaneous showing of majority support. If, as the General Counsel and the Union contend, the 1988 Letter of Assent was a demand for recognition, there was no showing of majority support until, at the earliest, January 25, 1991. This is a period of two and one-half years between the execution of the Letter of Assent and the January 25, 1991 letter. In *NLRB v. Goodless,* the Court found as a matter of law that a one year period between the demand and majority showing did not meet the requirement of being contemporaneous. The 1991 letter of assent was not signed until February 21, 1991. Its language, in terms of recognition, is clearly prospective in nature. Thus, it cannot refer to the January 25, 1991 letter and, therefore, cannot serve as consent to voluntary recognition based on a previous, alleged demonstration of majority support.

Assuming, arguendo, that January 25, 1991 was the date of demand for recognition and thus the date on which a contemporaneous showing of majority support must be made, the Union's attempt to perfect a Section 9(a) relationship still fails. At the time of the proffer of cards, there were 12 employees in the unit. Two of the cards were void *ab initio*, that of Whitelock and his son. Of the remaining eight cards, two, those of Charette and Plasse, had been signed within one year of the proffer. Seven cards were needed to demonstrate majority support. The remaining cards and their dates are Lenelin (5/5/89), Gareau and Morin (6/5/89), Montemagni (8/11/89) and Peters (1/1/90). I find that these cards are too old to satisfy the contemporaneous requirement. They are clearly too old to satisfy the Court in *NLRB v. Goodless,* which adopted a one year requirement,. citing an Advice Letter from NLRB General Counsel to Regional Director of Region 9, Feb. 27, 1989. The cases in which the Board has allowed cards older than a year to be used to show majority support generally have involved some exceptional circumstance. There is no exceptional circumstance here. In the Board case of *Goodless,* the Board was dealing with cards which had all been signed at about the same time they were presented to the employer. There has been no reason advanced why cards from those of Haas' employees who wanted a Section 9(a) relationship could not have been obtained contemporaneously with the January 25, 1991.

In conclusion, I find that the Union and General Counsel have failed to show that a clear and unequivocal demand for recognition under Section 9(a) was made, that a clear and unequivocal grant of voluntary recognition was given, and have further failed to establish that the Union made a contemporaneous showing of majority support. I find that the Union and General Counsel have failed to establish that the Union ever perfected or enjoyed a Section 9)a) relationship with Haas Electric, Inc. Having previously found that Respondent lawfully

withdrew from multiemployer bargaining and the Union at the end of June 30, 1993, I will recommend that the Complaint be dismissed.[9]

Conclusions of Law

I. Haas Electric, Inc. is an employer within the meaning of Section 2(2), (6) and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. The Respondent did not commit any unfair labor practices as alleged in the Complaint.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[10]

ORDER

The complaint is dismissed.

Dated, Washington, D.C.

_____
Wallace H. Nations
Administrative Law Judge

[9] As the withdrawal was lawful, the unilateral changes in wages, hours, and working conditions made by Haas subsequent to June 30, 1993 were likewise lawful. In the event that this finding is subsequently overruled by the Board, it is strongly urged that the Board take into consideration the extreme delay that occurred between the filing of the charge herein and the trial of this case, some four and one-half years. For the majority of this period, Respondent was under the impression that the matter would be dismissed. None of the delay is attributable to Respondent. Therefore any remedy fashion should be prospective and should not include any monetary damages for the period in which this case was on hold. To do otherwise would be unconscionable and would likely force Respondent out of business.

[10] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.